84-1560

No. ____

In the Supreme Court

OF THE

United States

OCTOBER TERM

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS.

ROBERT RUBANE DIAZ,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the public's right of access to criminal proceedings, guaranteed by the United States Constitution First Amendment, extends to pretrial proceedings, in particular, preliminary hearings.

2. Whether the standard for closure of preliminary hearings under *California Penal Code,* Section 868 set by the California Supreme Court violates the constitutional rights of the public, including the press.[1]

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[1]The parties to this action are The Press-Enterprise Company, Superior Court of the State of California, County of Riverside. In compliance with Rule 28.1 of the Rules of the Supreme Court, petitioner advises the Court that it is a California corporation and has no subsidiaries or affiliates.

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ORDERS BELOW

The Order of the California Supreme Court was reported and appears in the Appendix hereto (See Appendix, page 1). The order of the California Court of Appeals, Fourth District, Division Two was reported and appears in the Appendix hereto (See Appendix, page E-1).

JURISDICTION

The Order of the California Supreme Court was entered on December 31, 1984, and became final on January 31, 1985. Under 28 U.S.C., Section 1257(3), this Court's jurisdiction is invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment 14, Section 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At issue in the instant case is the public's constitutional right of access to pretrial criminal proceedings, specifically, its right of access to preliminary hearings and the transcripts thereof.[2]

The defendant, ROBERT RUBANE DIAZ, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administrating massive doses of the heart drug, lidocaine, which put him in risk of the death penalty. At the time of the preliminary hearing, representatives of television stations, radio stations and newspapers were present. On DIAZ's motion, pursuant to *California Penal Code*, Section 868, the court ordered the preliminary hearing closed to the public, including the press. The preliminary hearing lasted a period of 41 days and DIAZ was held to answer on all charges. The judge then sealed all transcripts.

Approximately seven months later, petitioner sought to gain access to the transcripts in the superior court. Defendant DIAZ opposed, presenting evidence of publicity given the case by the media, some of which had continued until the time of the hearing. The court determined that the defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. It further determined that there was a "reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial" and he ordered the transcript remain sealed.

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[2]The transcripts of the proceeding were ultimated released by the superior court after the defendant, ROBERT RUBANE DIAZ, waived his right to a jury trial. Although technically moot, the California Supreme Court determined that the case presented an important question affecting the public interest.

Petitioner then sought relief in the Court of Appeal, Fourth District, Division Two, through a Petition for Writ of Mandate to compel the respondent court to vacate its order and to release the transcripts to the public. The appellate court summarily denied petitioner's request, without articulation.

Thereafter, petitioner filed a Petition for Hearing to the California Supreme Court. On May 19, 1983, the supreme court granted the Petition for Hearing and ordered the matter retransferred to the Court of Appeal, Fourth District, Division Two, with directions to issue an alternative writ of mandamus and to set the matter for hearing. On June 27, 1983, the court of appeal issued an alternative writ of mandate and the matter was heard on October 5, 1983.

On January 12, 1984, the court of appeal filed its opinion discharging the alternative writ of mandate and denying issuance of a peremptory writ. In its opinion, the court determined that there was no constitutional right of public access to preliminary hearings. Additionally, the appellate court determined that the public's statutory right of access arising under *California Penal Code*, Section 868 could be foreclosed upon a showing of a "reasonable likelihood of substantial prejudice" which would infringe on the defendant's right to a fair trial.

On February 21, 1984, petitioner filed a Petition for Hearing in the California Supreme Court. The Petition for Hearing was granted and the matter set for hearing. On December 31, 1984, the California Supreme Court rendered its decision determining that the First Amendment of the United States Constitution does not provide a right of access to preliminary hearings. It further determined that the statutory right of access under *Penal Code*, Section 868 could be denied upon showing of a "reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial.

REASONS FOR GRANTING THE WRIT

I

IN DENYING THE PUBLIC A CONSTITUTIONAL RIGHT OF ACCESS, THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH DECISIONS BY OTHER STATE AND FEDERAL COURTS.

Since this Court's decision in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), considerable uncertainty has existed throughout the state and federal courts on the issue of whether the First Amendment right of access extends to pretrial proceedings. In *Gannett*, this Court specifically reserved that question for future consideration. It is imperative that this Court now resolve this issue.

The issue of the public's right of access to pretrial criminal proceedings has received varying treatment throughout the states, resulting in protection of this important right being dependent upon geographic location. Equal protection of this right can only be achieved by a decision from this Court.

In the federal courts which have addressed this matter, there is generally unanimity that the public's constitutional right of access extends to pretrial criminal proceedings. *Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982). Yet, noticably lacking is the same consistency as to when closure is constitutionally permissible.

The Third Circuit has determined that before a trial court can close a hearing, it must "make specific findings to support its conclusion that other means will be insufficient to preserve the defendant's rights and that closure is necessary to protect effectively against the perceived harm." *United States v. Criden*, 675 F.2d at 561-62. The Ninth Circuit, however, has stated that closure is permitted only when there is a showing of a "substantial probability that irreparable damage to the defendant's fair-trial right will result; a substantial probability that alternatives to closure will not adequately protect this right; and a substantial probability that closure will be effective in protecting against the perceived harm." *United States v. Brooklier*, 685 F.2d at 1162.

According to the Fifth Circuit, the defendant seeking to close a pretrial hearing must merely show that his Sixth Amendment right is "likely to be prejudiced," that alternatives to closure are inadequate, and that "closure will probably be effective." *United States v. Chagra*, 701 F.2d at 365. The Second Circuit, on the other hand, requires a showing of a "significant risk of prejudice" and further requires the trial court to consider alternatives to closure and "reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *Application of the Herald Co.*, 734 F.2d at 100.

In the state courts, an even greater disparity in reasoning and holdings exists. To date, at least seventeen states have addressed the issue of the public's right of access to pretrial criminal proceedings.

Eleven states have determined that a right of access to pretrial criminal proceedings arises under the First Amendment, under state law, or under both. *Arkansas Television Co. v. Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983) (suppression hearing); *Ashland Pub. Co. v. Asbury*, 612 S.W.2d 749 (Ky.Ct.App. 1980), (various pretrial proceedings); *Buzbee v. Journal Newspapers Inc.*, 297 Md. 68, 465 A.2d 426 (1983), (suppression hearing); *Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983), (change of venue and suppression hearings); *State ex rel. Smith v. District Court of Eighth Judicial District, Cascade County*, 654 P.2d 982 (Mont. 1982), (suppression hearing); *State v. Williams*, 93 N.J. 39, 459 A.2d 641 (1983), (probable cause and bail application hearings); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979), (mental competency hearing); *Petition of the Daily Item*, 310 Pa.Super. 222, 456 A.2d 580 (1983), (preliminary hearing); *Kearns-Tribune Co., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515 (Utah 1984), (preliminary hearing); *Herald Assoc. v. Ellison*, 138 Vt. 529, 419 A.2d 323 (1980), (suppression hearing); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W.Va. 1980), (suppression hearing).

Even within these states which have recognized a right of access, there is a divergence of opinion as to when and under what circumstances that right may be foreclosed.

Six states, however, including California in the instant case, have determined that there is no constitutional right of access to pretrial criminal proceedings. *State v. Burak*, 37 Conn.Supp.627, 431 A.2d 1246 (1981), (suppression hearing; *In re Midland Publishing Co., Inc. v. District Court Judge*, No. 68862 (Mich. Dec. 28, 1984), (preliminary hearing); *Dickinson Newspapers Inc. v. Jorgensen*, 338 N.W.2d 72 (N.D. 1983), (preliminary hearing); *Steinle v. Lollis*, 279 S.C. 375, 307 S.E.2d 230 (1983), (preliminary hearing); *State ex rel. Feeney v. District Court of the 75th Judicial District*, 607 P.2d 1259 (Wyo. 1983), (various pretrial proceedings).

Undeniably, the public's First Amendment right of access and the extent to which it pertains to a pretrial criminal proceeding is a question of significant importance. Numerous lower courts have grappled with the issue, but no concensus of opinion has emerged. Until this Court resolves this matter, uniform recognition and protection of this important right will not occur.

II

THE CALIFORNIA SUPREME COURT FAILED TO FOLLOW PRIOR DECISIONS OF THIS COURT BY IGNORING THE SOCIETAL FUNCTIONS SERVED BY PUBLIC ACCESS TO CRIMINAL COURT PROCEEDINGS, IN PARTICULAR, PRELIMINARY HEARINGS.

In its determination that the constitutional right of access does not extend to preliminary hearings, the California Supreme Court utterly ignored the important societal functions served by allowing access as stated by this Court repeatedly. By so doing, the opinion is contrary to decisions of this Court requiring a consideration of the structural importance of the proceeding.[3]

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[3]While a review of the historical evidence of a particular proceeding is often helpful in determining whether a First Amendment right of access extends to the proceeding, the history of preliminary hearings is inconclusive. It appears that preliminary hearings may have been closed to the public at early common law (*Gannett v. DePasquale*, 443 U.S. at 437 (Blackman, J., concurring in part and dissenting in part), but they were closed not only to the public but to the accused's counsel as well. See, e.g., *Cox v. Coleridge*, 1 B. & C. 37, 107 Eng.Rep. 15 (1822).

In this country, however, preliminary hearings traditionally have been open. Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. Law Review 397, 407 (1961). Even in those jurisdictions which adopted the Field Code provision allowing closure of the preliminary hearings upon the request of the defendant, the provision rarely was invoked until the 1960's when the California Supreme Court decided *People v. Elliott*, 54 Cal.2d 498; 354 P.2d 225, 6 Cal.Rptr. 753 (1960).

This Court has recognized numerous benefits accruing from public access to criminal proceedings. Access helps to insure the basic fairness of the proceeding, encouraging all participants to perform their duties conscientiously (*Gannett v. DePasquale*, 443 U.S. at 383; *id.* at 434 [Blackman, J., concurring in part and dissenting in part]) discouraging misconduct and abuse of power by judges, prosecutors, and other participants (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (Burger, C.J., plurality opinion); *id.*, at 596 (Brennan, J., concurring)). Additionally, open proceedings assure accurate fact-finding through the improvement of witness testimony by discouraging witnesses from committing perjury (*Id.*, at 569; *Gannett*, 443 U.S. at 427) and by inducing unknown witnesses to come forward and testify (*Richmond Newspapers*, 448 U.S. at 570, n.8 *id.*, at 596-97; *Gannett*, 443 U.S. at 383).

Public access also serves to educate the public about the criminal justice process (*Richmond Newspapers*, 448 U.S. at 572-73; *Gannett*, 443 U.S. at 383) which is essential to informed citizen debate and decision-making about issues with significant effects beyond the outcome of the particular proceeding.

Public access serves an important "sunshine" function as closed proceedings may foster distrust of the judicial system (*Id.* at 429). Thus open proceedings enhance the appearance of justice and helped maintain public confidence in the judicial system. (*Richmond Newspapers*, 448 U.S. at 570-71; *id.*, at 594-95). Finally, access can also serve a community therapeutic function by allowing the public to see that justice is done. (*Id.*, at 571-572).

These critical benefits are the very foundation for this Court's recognition of a constitutional right of access to criminal trials. Analysis of the extent to which these same benefits would accrue from open pretrial proceedings is helpful in determining if the access right extends to those proceedings. In particular, whether the right of access should extend to a preliminary hearing must be dependent upon the important societal functions served by allowing access to the proceeding.

The preliminary hearing is a "critical stage" in the criminal justice process (*Hawkins v. Superior Court*, 22 Cal.3d 584, 586 P.2d 916, 150 Cal.Rptr. 435 (1978)) wherein the defendant "immediately becomes entitled to an impressive array of procedural rights . . ." *Id.*, at 587.

At the preliminary hearing, the defendant has a right to counsel (*California Penal Code*, Section 866.5), witnesses are examined in the presence of the defendant and are subject to cross-examination (*California Penal Code*, Section 865), the defendant is entitled to present witnesses on his or her own behalf and to testify (*California Penal Code*, Sections 866 and 866.5) and "a neutral and legally knowledgeable magistrate" is required to "weigh the evidence, resolve conflicts and give or withhold credence to particular witnesses." *Jones v. Superior Court*, 4 Cal.3d 660, 483 P.2d 1241, 94 Cal.Rptr. 289 (1971). The preliminary hearing in California has almost all the attributes of a trial in California.

Additionally, preliminary hearings may be the only judicial proceeding of substantial importance that takes place during a criminal prosecution, because so many cases are disposed of without trial. *San Jose Mercury News v. Municipal Court*, 30 Cal.3d 498, 638 P.2d 655, 179 Cal.Rptr. 772 (1982). Just as significant, the hearing often provides the forum for issues involving police misconduct and exclusion of evidence. *Id.* at 511.[4] Since what transpires at the preliminary hearing often determines the ultimate disposition of the case it is, without question, a vital stage in the criminal justice process.

Clearly, public scrutiny of the preliminary hearing will enhance the quality and safeguard the integrity of this fact-finding process, and improve the quality of the testimony and provide a means whereby unknown witnesses may become known. Access will also serve to educate the public about this critical stage in the criminal process, thereby enhancing their understanding of the entire criminal justice system.

Accordingly, the reasoning of this Court in support of a right of access to the trial itself applies with equal force to this pretrial proceeding. By failing, in its determination, to consider the societal functions served by allowing access, the California Supreme Court's opinion denying a constitutional right of access to preliminary hearing is without foundation.

III

THE STANDARD FOR CLOSURE SET BY THE CALIFORNIA SUPREME COURT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

In addition to its determination that the constitutional right of access does not extend to preliminary hearings, the supreme court also determined that, under *California Penal Code*, Section 868, such hearings may be closed upon a

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[4]The very length of preliminary hearings in California further emphasizes their significance. The preliminary hearing in the instant case lasted a total of forty-one (41) days and there appears to be a trend toward hearings of this length or longer in cases of considerable community interest and importance.

showing of a "reasonable likelihood of substantial prejudice." Petitioner recognizes that this normally would be simply a matter of statutory interpretation, not reviewable by this Court. However, with the right of access extending to preliminary hearings, the standard set by the supreme court infringes upon this First Amendment right, rendering *California Penal Code*, Section 868 unconstitutional in its application.

This Court, has determined that closures "must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Company v. Superior Court*, 464 U.S. ____ (1984). A trial court, before closing a criminal proceeding, must determine that closure is "essential to preserve higher values" and "narrowly tailored to serve that interest". *Id.* Thus, before closure can be allowed, the court must be satisfied that closure is necessary to protect an overriding interest and that no alternative means are available to preserve that interest.

Allowing a preliminary hearing to be closed upon a mere showing of "reasonable likelihood of substantial prejudice," as directed by the California Supreme Court, unconstitutionally permits closures that are not "essential to preserve higher values". Nor does the standard set by the California Supreme Court require a consideration of alternative means to protect the interests at issue or require the trial court to assure that any closure is narrowly tailored to serve the interest at issue. Clearly, the loose standard set by the California Supreme Court will allow for unnecessary closures, making closing of courts the rule, rather than the exception.

CONCLUSION

This court has consistently recognized that openness, with the rarest of exceptions, will actually serve to enhance the basic fairness of our system of justice by assuring that established procedures are being followed and that any deviations will become known. Notwithstanding this, due to the lack of a clear statement from this Court that the right of access protected by the First Amendment extends to critical pretrial proceedings, the rights of the public continue to be curtailed. The time has now come for this Court to address the question left open in *Gannett v. DePasquale* and to eliminate the conflict and confusion which presently exists.

DATED: March 29, 1985

THOMPSON & COLEGATE

By: JAMES D. WARD

Attorneys for Petitioner
The Press-Enterprise Company

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PRESS-ENTERPRISE COMPANY,
Petitioner,
vs.
THE SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent;
ROBERT RUBANE DIAZ,
Real Party in Interest.
L.A. 31876

SUPREME COURT
FILED
DEC. 31, 1984
Laurence P. Gill, Clerk
Deputy

In the instant case we consider the appropriate standard to be applied by a magistrate in determining whether the public's right of access to preliminary hearings should be limited due to the risk of impairment of a defendant's right to a fair trial.

The real party in interest, Robert Rubane Diaz, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. He was also charged with special circumstances. At the time of the preliminary hearing there were many representatives of television stations, radio stations and newspapers present. On Diaz' motion pursuant to Penal Code section 868,[1] the court ordered the preliminary hearing closed to the press and public. The preliminary hearing was held over a period of

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[1]Unless otherwise indicated, all statutory references are to the Penal Code.

41 days, and Diaz was held to answer on all charges. The judge sealed all transcripts.

SEE CONCURRING AND DISSENTING OPINIONS

About seven months later, petitioner sought to gain access to the transcripts in the superior court. The prosecution joined in the motion. Diaz opposed, presenting evidence of the widespread publicity given to the case by the media, some of which had continued until the time of the hearing. The judge, concerned that releasing the transcript might require either delay of the proceedings or transfer of the trial to another jurisdiction, pointed out that defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. The judge found that "there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." He ordered that the transcript remain sealed, and petitioner commenced the instant mandamus proceeding.[2]

THE ASSERTED CONSTITUTIONAL RIGHT OF ACCESS

Prior to its 1982 amendment, section 868 provided that upon the request of the defendant, the magistrate shall exclude the public from the preliminary examination. In San Jose Mercury-News v. Municipal Court (1982) 30 Cal. 3d 498, the statute was upheld against a claim that the federal and state Constitutions give the press and public a right of access to preliminary hearings that may be foreclosed only when outweighed by defendant's interest in a fair trial and that section 868 violated that right because it had no provision for balancing of competing interests in individual cases.

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[2]The trial has been completed. Although technically moot, the case presents an important question affecting the public interest, and review is appropriate. (San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 501, fn. 2.)

In considering the claim of violation of federal constitutional rights, the court recognized that the United States Supreme Court has held that the First Amendment provided a qualified right of public access to the trial and that a majority of justices had recognized a qualified right of access to pretrial hearings such as suppression hearings. (30 Cal.3d at pp. 503-506.) The court pointed out that the basis of the qualified access right was the long history of trials being presumptively open and that the open trial tradition guards against persecution and favoritism, increases public awareness of the judicial process, inspires confidence in the criminal justice system, and serves the cathartic needs of the community. (30 Cal.3d at p. 505.)

In *San Jose Mercury-News,* the court also pointed out that seven of the United States Supreme Court justices had stated that preliminary hearings, unlike trials, were traditionally private at common law and were distinguishable from pretrial suppression hearings. (30 Cal.3d at pp. 504-506.) This court concluded that no right of access arose under the First Amendment. (30 Cal.3d at p. 506.)

In rejecting the claim of conflict with the California Constitution, the court recognized that state constitutional guarantees may give greater protection to some rights than the federal counterparts, but concluded that the Legislature reasonably gives fair trial rights a preference over access rights in certain classes of proceedings where danger of prejudice is strong and proof on a case-by-case basis appears difficult and that section 868 was a permitted means of protecting defendants' rights to a fair trial free of juror bias.[3] (30 Cal.3d at pp. 506-514.)

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[3]Because they bear on the proper interpretation of section 868 as amended in 1982, the policy concerns which led to the court's conclusion will be discussed in detail in the statutory portion of the opinion.

Petitioner urges that recent decisions of the United States Supreme Court require repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to a preliminary hearing. Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, involved a Massachusetts statute requiring mandatory closure of trial during the testimony of a minor sex victim. The court again relied upon the tradition of trials being open to the press and public, and it asserted that before a state may deny the right of access it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. (457 U.S. at pp. 603-607.) Responding to an argument that trials have not always been open during testimony of minor sex victims, the court in a footnote stated that whether the First Amendment right of access can be restricted in the context of any criminal trial depends not on the historical openness of that type of trial but rather on the state interests assertedly supporting the restriction. (457 U.S. at p. 605, fn. 13.) The court concluded that the Massachusetts statute was not narrowly tailored to accommodate the state's compelling interest in protecting the physical and psychological well-being of a minor and that rather than mandatory closure the state's interest may be protected by a case-by-case determination whether closure is necessary to protect the welfare of the minor. (457 U.S. at p. 608.)

The second case relied upon by petitioner is Press Enterprise Company v. Superior Court (1984) ____ U.S. ____ [78 L.Ed.2d 629, 104 S.Ct. 819], where the court held that an order closing voir dire proceedings was invalid on the ground that the trial judge had failed to consider alternative measures. In a concurring opinion, Justice Stevens stated that the purpose of the access right is assuring freedom of communication on matters relating to the functioning of government and that "the distinction between trials

and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." (____ U.S. at p. ____ [78 L.Ed.2d at p. 742, 104 S.Ct. at p. 828].)

Neither case warrants repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to preliminary hearings. Both cases were concerned with the right of access to trials rather than preliminary hearings. The problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings. In *Press Enterprise Company* the court emphasized that prejudice to the defendant remains the primary con ern, stating: "No right ranks higher than the right of the accused to a fair trial." (____ U.S. at p. ____ [78 L.Ed. 2d at p. 637, 104 S.Ct. at p. 823].) The main concern asserted in both cases to justify closure was not prejudice to the defendant but the interests of others, i.e., the privacy rights of prospective jurors and the physical and psychological well-being of minor sex victims.

While a footnote in *Globe Newspaper Co.* suggests that historical openness may no longer be an element of the First Amendment access right, the footnote by its own language is limited to trials. (Globe Newspaper Co. v. Superior Court, *supra*, 457 U.S. at p. 605, fn. 13.) The subsequent *Press Enterprise Company* decision not only indicates that one of the bases of the access right to trials as established by Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555 is that trials were open at the time of the adoption of the First Amendment but also devotes the first portion of the opinion to establish that at the time of the adoption of the First Amendment public jury selection was the common practice in America. While the statement of Justice Stevens relied upon by petitioner is to the effect that the access right

is not limited to trials, it does not establish that historical conditions are irrelevant because he also states that the question before the court " 'focuses . . . on First Amendment values and the historical backdrop against which the First Amendment was enacted.' " (___ U.S. at p. ___ [78 L.Ed.2d at p. 642, 104 S.Ct. at p. 828].)

We conclude that petitioner and amici have failed to establish a basis for repudiating the conclusion in the 1982 decision in *San Jose Mercury-News* that the First Amendment access right does not extend to preliminary hearings. In addition, petitioner and amici have not pointed to any matters warranting repudiation of the portion of *San Jose Mercury-News* relating to the California Constitution.

THE STATUTORY ACCESS RIGHT

Shortly after the decision in 1982 in *San Jose Mercury-News*, the Legislature amended section 868 to delete the defendant's absolute right to closure and to establish a right of access to preliminary hearings. The amended section reads: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination [all but certain enumerated officials, defendant and his counsel, and the prosecuting witness and a friend.]" (Italics added.)

The parties and amici dispute the appropriate standard to be applied by the magistrate in determining whether exclusion is "necessary" in order to protect the defendant's right to a fair and impartial trial. Some of the language in the brief submitted by amici suggests that exclusion is appropriate only if the magistrate finds that failure to exclude will result in an unfair trial.

Petitioner argues for the test set forth in United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167 where the court stated that an "accused who seeks closure must establish 'that it is strictly and inescapably necessary in order to protect the fair trial guarantee.' This burden may be discharged by demonstrating: (1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.' " *Brooklier* did not involve preliminary hearings but rather hearings on motions to suppress and the juror voir dire. The *Brooklier* test is based on the dissenting opinion of Justice Blackmun in Gannett Co. v. DePasquale (1979) 443 U.S. 368, 406, 440-446. Justice Blackmun, joined by Justices Brennan, White and Marshall, urged that the Sixth Amendment right to a public trial was not personal to the defendant but established an access right for the public. The majority rejected that view.[4]

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[4]Justice Blackmun recognized that in some cases of suppression hearings closure might be justified. "The trial judge faced with a closure motion has the more difficult task of looking into the future. I do not mean to suggest that only in the egregious circumstances of cases such as *Estes* and *Sheppard* would closure be permissible. But to some extent the harm that the defendant fears from publicity is also speculative."

"If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while

Defendant urges that the proper test is that the preliminary hearing must be closed upon a defendant's request if the magistrate finds "a reasonable likelihood" of substantial prejudice which would impinge upon the right to a fair trial. The trial court purported to apply this test. The test appears to be based on the concurring opinion of Justice Powell in Gannett Co. v. DePasquale, *supra*, 443 U.S. 368, 397-403. He joined the majority opinion in holding that the Sixth Amendment did not confer access rights but concluded that the First Amendment provides a limited right of access to suppression hearings. He rejected Justice Blackmun's test for closure on the ground that it was inflexible and could prejudice defendant's rights and disserve society's interest in the fair and prompt disposition of criminal trials. He concluded that the test is whether "a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury." (443 U.S. at p. 400.) He stated that it is the defendant's responsibility to show that public access would interfere with the fairness of his trial but that those opposing closure have the burden of showing that alternative procedures are available that would eliminate the danger of prejudice.[5]

The test of reasonable likelihood that the defendant will not receive and impartial trial is used in considering mo-

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admitting to other portions where the information the accused seeks to suppress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at pp. 444-445.)

[5]In *Gannett Co.* the trial judge found "a reasonable probability" of prejudice, and the majority held this would overcome a First Amendment right of access.

tions for change of venue. (Odle v. Superior Court (1982) 32 Cal. 3d 932, 937; Martinez v. Superior Court (1981) 29 Cal.3d 574, 578.) Also the test has been used with respect to gag orders. (Younger v. Smith (1973) 30 Cal.App.3d 138, 159-164; see Brian W. v. Superior Court (1978) 20 Cal.3d 618, 624, fn. 7.) The Legislature has established a standard of reasonable likelihood of prejudice to the defendant to be applied in determining whether a grand jury transcript should be unsealed. (§ 938.1, subd. (b).) The test has also been applied in determining whether a purported confession should be suppressed pending trial. (Cromer v. Superior Court (1980) 109 Cal.App.3d 728, 731 et seq.)

The legislative history of the amendment to section 868 shows that the Legislature intended the courts to determine the appropriate standard. Assembly Bill No. 277 as originally introduced and as adopted opens preliminary hearings unless the magistrate finds it "necessary" to close to protect the defendant's right to a fair trial. As originally worded, the bill provided that the finding that it is necessary to close "would require a demonstration of a clear and present danger of irreparable damage to the defendant's right to a fair and impartial trial, that the alternatives to closure will not adequately protect that right, and that the closure will effectively protect against the perceived harm." In the Assembly, the second condition relating to alternatives to closure was deleted before the bill was passed.

Clear and present danger language was contained, although in slightly different form, in the bill passed by the Senate, but the Conference Committee report was rejected in the Assembly, and the bill was amended in the Assembly to substitute "preponderant probability" for "clear and present danger." The bill was amended in a second Conference Committee report to delete all of the language defining "necessary," and as finally approved, the amendment

to section 868 provides no definition of "necessary." (The bill as enacted also dealt with matters other than the amendment of section 868.)

The deletion of any definition of the word "necessary" shows that, while the Legislature concluded that preliminary hearings should be public unless there was conflict with the defendant's right to a fair trial, the Legislature intended that the courts should determine the standard to be applied in weighing the public's right of access against the defendant's fair trial right.

In San Jose Mercury-News, the court detailed the policy factors in favor of holding preliminary hearings in public: Exposure of government functions to public view serves societal interests in a democratic government. Open preliminary hearings guard against persecution and favoritism, increase public awareness of the judicial process, inspire confidence in the criminal justice system, and serve the cathartic needs of the community. Preliminary hearings are an important step in the accusatorial process. There are many similarities to the trial; witnesses may be cross-examined, each side has an incentive to prevail, and the hearing may reveal weaknesses in the prosecution or defense, forecasting the ultimate disposition.

Often the preliminary hearing turns out to be the only judicial proceeding of substantial importance that takes place during a criminal prosecution because so many cases are disposed of without trial. The hearing often provides the forum for issues involving police misconduct and exclusion of evidence. The court also pointed out that pretrial publicity, even pervasive adverse publicity, does not invariably lead to an unfair trial. (30 Cal.3d at pp. 505, 509-514.)

On the other hand, the court in *San Jose Mercury-News* pointed to several concerns militating against a public

preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing. While the Legislature has since amended section 868 to delete the defendant's absolute right to closure, the concerns enumerated in *San Jose Mercury-News* obviously bear upon our determination of the appropriate standard to be applied under the amended statute.

The concerns militating in favor of a right of closure recognized by the court include: The evidence at the preliminary hearing may be one-sided and misleading because the testimony is often that of the prosecution only — the defense remaining silent if it appears that reasonable or probable cause has been established. Many nonlawyers may not be aware of the function of a preliminary hearing which is not a trial with the danger that they may ascribe to a one-sided hearing the legitimacy and credibility of a trial. Magistrates may err in their evidentiary hearings, and there is a danger that highly prejudicial evidence which will be inadmissible at trial will be admitted or adverted to and reported by the media.

In addition factual, relevant reporting, no less than inflammatory publicity, may threaten a defendant's right to a fair trial by producing a jury pool "within which a defendant's guilt has already been ascribed." (30 Cal.3d at p. 512.)

Because the preliminary hearing takes place at an early stage in the criminal prosecution, it may be difficult or impossible for the defendant to make a showing of the prejudice which will occur from publicity. At an early stage, the community reaction and the media attitude may not be clear, and the defendant may have little knowledge of the prosecution's strategy and evidence. "Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on

speech and press rights. (See, e.g., Nebraska Press Assn., *supra*, 427 U.S. 539, 556-560 [49 L.Ed.2d 683, 695-698]; Brian W., *supra*, 20 Cal.3d 618, 624, fn. 7.) Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; Brian W., *supra*, 20 Cal.3d at p. 625.)" (San Jose Mercury-News v. Municipal Court, *supra*, 30 Cal.3d at pp. 511-513.)

We reject the view that a magistrate in ruling on a request to close the preliminary examination must find that in fact an open preliminary hearing will result in a denial of fair trial. At the time that the magistrate makes the finding predictions must be made as to the amount and nature of publicity which will result from an open preliminary hearing and as to the impact of the anticipated publicity. The legislative history of the two standards contemplated, "clear and present danger" and "preponderant probability," indicates that the Legislature had in mind a lesser standard than a factual finding of actual prejudice.

The legislative history of the two standards contemplated, as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. "Necessary" is often used in the sense of essential (Webster's New Internat. Dict. (2d ed. 1959) p. 1635), and the terms "clear and present danger" and "preponderant possibility" reflect that a substantial showing of potential prejudice must be made before the preliminary hearing may be closed.

The test urged by defendant, a reasonable likelihood of substantial prejudice, and the test urged by petitioner, a substantial probability of irreparable damage, meet the requirement of a substantial showing of potential prejudice. While there is some difference between the two standards, it obviously is not very great.

Weighing the language of section 868, the legislative history, and the policy factors discussed above, we conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal Code section 868 makes clear that the primary right is the right to a fair trial and that the public's right of access must give way when there is conflict.

Once a defendant establishes a reasonable likelihood of substantial prejudice, there is a clear and present danger of prejudice, and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice. But if the showing in opposition fails to overcome the defendant's showing that there is a reasonable likelihood of substantial prejudice, it would be improper for the magistrate to jeopardize the fair trial right by permitting a public preliminary hearing. The primacy of the right to fair trial, viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial by an open hearing.

The peremptory writ of mandate is denied. The alternative writ, having served its purpose, is discharged.

BROUSSARD, J.

WE CONCUR:
BIRD, C. J.
MOSK, J.
KAUS, J.
REYNOSO, J.

APPENDIX B

PRESS-ENTERPRISE COMPANY v. SUPERIOR COURT L.A. 31876

CONCURRING OPINION BY GRODIN, J.

The majority's determination that the First Amendment provides no right of access to preliminary hearings is unnecessary to the decision of this case, and I do not join in it. The only constitutional question presented is whether the First Amendment requires a *greater* right of access than the Legislature has seen fit to establish by statute. I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the "rule rather than the exception" (typed op., 16), the exception existing only when exclusion of the public is, to use the language of the statute, "necessary in order to protect the defendant's right to fair and impartial trial."

I agree also that the determination of "necessity" must inevitably be a matter of judgment based upon probabilities, and that the phrase "substantial showing of potential prejudice" (or, what amounts to the same thing, a "reasonable likelihood of substantial prejudice") constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that.

GRODIN, J.

APPENDIX C

PRESS-ENTERPRISE COMPANY v. SUPERIOR COURT L.A. 31876

CONCURRING AND DISSENTING OPINION BY LUCAS, J.

I concur in the judgment but dissent to the majority's analysis. By reason of the 1982 amendment to Penal Code section 868, preliminary hearings are required to be "open and public" unless the magistrate expressly finds that exclusion of the public is "necessary" to protect the defendant's right to a fair and impartial trial. In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of *necessity*. In my view, the majority's new standard improperly ignores the statutory language.

As the majority concedes, "The legislative history ... as well as its use of the word 'necessary,' makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. 'Necessary' is often used in the sense of essential ...." (*Ante*, p. ____ [maj. opn. at p. 16].) Although a showing of *actual* prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a *substantial probability* of prejudice. (See United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here.

As the trial is completed and the case is now moot, I concur in the judgment denying the peremptory writ.

LUCAS, J.

APPENDIX D

PRESS-ENTERPRISE CO. v. SUPERIOR COURT
RIVERSIDE
L.A. No. 31876

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Trial Court & No.:

Riverside County
Crim. 19889

Superior Court Judge:

The Honorable
John H. Barnard

APPENDIX E

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

PRESS-ENTERPRISE COMPANY,
Petitioner,
v.
SUPERIOR COURT, RIVERSIDE COUNTY,
Respondent,
ROBERT RUBANE DIAZ,
Real Party in Interest.

COURT OF APPEAL, FOURTH DISTRICT
FILED
JANUARY 12, 1984
KENNAN G. CASADY, Clerk
4 Civil 29785

OPINION

PETITION for writ of Mandate. Riverside Superior Court. John H. Barnard, Judge. Writ denied.

James D. Ward and Sharon J. Waters for Petitioner.

Grover C. Trask II, District Attorney, and Patrick F. Magers, Deputy District Attorney, for Respondent.

Michael B. Lewis, Public Defender, and John J. Lee, Deputy Public Defender, for Real Party in Interest.

Diane C. Campbell for Amicus Curiae on behalf of Respondent and Real Party in Interest.

Petitioner, Press-Enterprise Company, sought access to the transcript of the preliminary hearing of Robert Rubane Diaz. Diaz was charged with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. The hearing was closed at Diaz' request pursu-

ant to Penal Code section 868[1], and thereafter the transcript was ordered sealed. Following the preliminary hearing, Diaz was held to answer in the superior court on all 12 counts. Petitioner attempted to gain access to the transcript, but its request was denied at both the municipal and superior court levels. Petitioner then petitioned this court for a writ of mandate to compel the trial court to vacate its order sealing the transcript. We denied the writ and petitioner petitioned the California Supreme Court seeking a hearing. The Supreme Court granted a hearing and transferred the case to this court with directions to issue an alternative writ of mandate. After complying with this order, we discharge the alternative writ and decline to issue a peremptory writ for the reasons hereinafter set forth.

This case requires the resolution of the following issues: (1) Does the public enjoy a constitutional right of access to preliminary hearings and transcripts generated therefrom?[2] (2) Does a recent amendment to section 868 grant the public a statutory right of access to preliminary hearings and transcripts (3) What standard does section 868 require the court to employ in balancing a defendant's constitutional right to a fair trial against the public's statutory right of access? and (4) Were the closure and sealing orders appropriate in this case?[3]

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[1]All statutory references are to the Penal Code unless otherwise stated.

[2]We note that the public necessarily includes the press because the media has no privileges beyond those of the public generally. (*Houchins* v. *KQED, Inc.* (1978) 438 U.S. 1, 11, 15-16 [57 L.Ed.2d 553, 562, 98 S.Ct. 2588]; *San Jose Mercury-News* v. *Municipal Court* (1982) 30 Cal.3d 498, 503 (hereafter *Mercury-News*).)

[3]Although the issue may now be technically moot, we are empowered to decide moot issues which escape appellate review due to their short durational life, and which present significant questions affecting the public interest. (E.g., *Hardie* v. *Eu* (1976) 18 Cal.3d 371, 379, cert. den., 430 U.S. 969 [52 L.Ed.2d 360, 97 S.Ct. 1652].)

I. Constitutional Considerations: Public Access to Preliminary Hearings and Transcripts.

Petitioner contends that the public has a constitutional right of access to preliminary hearings and transcripts. *Mercury-News, supra*, 30 Cal.3d 498 is dispositive on this issue. In *Mercury-News* the California Supreme Court upheld the constitutionality of former section 868 which required closure of a preliminary hearing at a defendant's request. In reaching this conclusion, the court held the public has no right of access to preliminary hearings under the federal or state Constitutions. (*Mercury-News, supra* 30 Cal.3d at pp. 506, 508-514.)

In *Gannett Co. v. DePasquale* (1979) 443 U.S. 368 [61 L.Ed. 2d 608, 99 S.Ct. 2898] the United States Supreme Court held that a defendant's Sixth Amendment right to a public trial creates no corresponding public right of access to either the trial or a pretrial suppression-of-evidence hearing. (*Gannett Co. v. DePasquale, supra,* 443 U.S. at pp. 384-394.)[4] One year later, in *Richmond Newspapers, Inc.* v. *Virginia* (1980) 448 U.S. 555 [65 L.Ed.2d 973, 100 S.Ct. 2814] the court held the public has a qualified First Amendment right of access to the trial itself. (*Richmond Newspapers, Inc.* v. *Virginia, supra,* 448 U.S. at p. 580.) Analyzing *Gannett* in conjunction with *Richmond Newspapers,* the *Mercury-News* court concluded the right of access did not extend to preliminary hearings.

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[4]"The Sixth Amendment, applicable to the States through the Fourteenth, surrounds a criminal trial with guarantees . . . personal to the accused." (*Gannett Co.* v. *DePasquale, supra,* 443 U.S. at pp. 379-380.) "The history upon which the petitioner and amici rely totally fails to demonstrate that the Framers of the Sixth Amendment intended to create a constitutional right in strangers to attend a pretrial proceeding, when all that they actually did was to confer upon the accused an explicit right to demand a public trial." (Pp. 385-386, fn. omitted.)

Post *Mercury-News* decisions advanced by petitioner do not detract from its dispositive nature. *Globe Newspaper Co.* v. *Superior Court* (1982) 457 U.S. 596 [73 L.Ed.2d 248, 102 S. Ct. 2613] considered a Massachusetts mandatory closure rule which barred press and public access to criminal sex-offense trials during the testimony of minor victims. The court held that the mandatory closure rule violates the First Amendment. (*Globe Newspaper Co.* v. *Superior Court, supra,* 457 U.S. at pp. — [73 L.Ed.2d at pp. 254-260].) Since the opinion in *Globe* was addressed to the actual trial, it is not controlling.[5] (Cf. *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at p. 388, fn. 19.) Post *Mercury-News* treatment of the issue by the federal circuit courts emphasizes the dichotomy between the preliminary hearing and other pretrial proceedings. Although there are cases where the federal courts have found a First Amendment right of access to certain pretrial proceedings, the result was obtained through an analogical comparison to a trial. Petitioner has not cited, nor have we found, any decision which extended the access right to preliminary hearing. Indeed, preliminary hearings are to be distinguished from rather than analogized to trials. (See *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at p. 437 (conc. & dis. opn. of Blackmun J.); *United States* v. *Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1167 and cases decided therein. See also *United States* v. *Criden* (3d Cir. 1982) 675 F.2d 550, 557 (distinguishing *Mercury-News*).)

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[5]In a concurring opinion Justice O'Connor stated that she did not interpret *Richmond Newspapers* "to shelter every right that is 'necessary to the enjoyment of other First Amendment rights.' [Citation.] . . . Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." (*Globe Newspaper Co.* v. *Superior Court, supra,* 457 U.S. at p. —— [73 L.Ed.2d at p. 260], emphasis added, conc. opn. of O'Connor, J.)

Although *Mercury-News* did not consider whether the public has a constitutional right of access to transcripts, logic dictates a reapplication of the preliminary hearing analysis. Accordingly, since there is no right of public access to preliminary hearings arising under either the federal or state Constitutions (*Mercury-News, supra,* 30 Cal.3d at pp. 506-508), there is no constitutional right to transcripts of such hearings.

II. Penal Code Section 868: A Statutory Right of Access

The principal changes accomplished by the 1982 amendment to section 868 are that the section now requires that the preliminary hearing shall be open and public, and it will only be closed when necessary in order to protect the defendant's right to a fair and impartial trial.[6] Prior to the amendment, closure was mandatory if requested, and no finding of necessity was required. (See Note, Criminal Procedure (1983) 14 Pacific L. J. 581, 583-584.) Petitioner contends that this amendment has the effect of granting the public a right of access to preliminary hearings and the transcripts thereof. We agree.

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[6]Section 868, as amended, reads in pertinent part: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, prosecutor and his or her counsel, the Attorney General, the district attorney of the county, . . ." (Stats. 1982, ch. 83, § 3 [operative March 1, 1982].)

Before the 1982 amendment section 868 read in pertinent part: "The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, court reporter and bailiff, the prosecutor and his counsel, the Attorney General, the district attorney of the county, . . ." (Stats. 1976, ch. 1178, § 2.)

Diaz' preliminary hearing commenced on July 6, 1982, over four months after the operative date of the 1982 amendment.

In *Mercury-News* the court stated the Legislature could properly accommodate competing free-speech and fair-trial interests. (*Mercury-News*, supra, 30 Cal.3d at p. 514.) The Legislature responded by amending section 868, effective March 1, 1982, about six weeks after the *Mercury-News* decision.

In apparent reference to the *Mercury-News* decision, the Legislature stated: "This act is an urgency statute. . . . [¶] The absence of clear legislative guidance has resulted in confusion concerning the access of the public and other parties to criminal proceedings. . . . Therefore, in order to clarify the rights of the public and others to know about the workings of our criminal justice system, it is necessary that this act become effective immediately." (2 West's Cal. Legl. Service (1982) pp. 394-395.) Since the Legislature has power to determine the rights of individuals, provided there is no interference with constitutional guarantees (*Modern Barber Col.* v. *Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 726), we conclude that a right of public access to preliminary hearings arises under section 868. This right of access extends to transcripts produced from preliminary hearings. (Compare *United States* v. *Brooklier, supra,* 685 F.2d at p. 1172 [denial of motion to release transcript was tantamount to a denial of right of access].)

III. Closure upon Necessity: A Balancing Approach

Petitioner asserts that the language of necessity in section 868 requires the application of the closure test adopted by the Ninth Circuit in *United States* v. *Brooklier, supra,* 685 F.2d 1162. This test, derived from the *Gannett* dissent (*Gannett Co.* v. *DePasquale, supra,* 443 U.S. at pp. 441-442 [conc. & dis. opn. of Blackmun, J.]), would require a defendant to establish that closure of his preliminary hearing is strictly and inescapably necessary in order to protect his fair trial guarantee. Under this standard a defendant must demonstrate: "(1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.'" (*United States* v. *Brooklier, supra,* 685 F.2d at p. 1167.)

The *Mercury-News* decision provides some guidance in developing an appropriate test. The court considered this issue in terms of the positive and negative aspects of an open preliminary hearing. In relating the beneficial value of an open preliminary hearing, the court recognized it may be the only time a judicial proceeding of importance occurs during a criminal prosecution, and therefore, the preliminary hearing would provide the sole opportunity for public observation of the criminal-justice system.

However, the court also noted that the nature of preliminary hearings presents danger that public access may prejudice a defendant's right to a fair trial. "As with other pretrial proceedings, the climate [preliminary hearings] may generate in advance of trial cannot always be nullified by relatively simple controls, such as sequestration and exclusion of witnesses, that are available to counter inflammatory publicity at the time of trial." (*Mercury-News, supra,* 30 Cal.3d at p. 511.) "Prejudice at times may be acute because of the superficial resemblance between preliminary hearing and trial. [Citation.] The distinct functions served by the two proceedings are not always clear to nonlawyers. They may ascribe to a one-sided preliminary hearing the legitimacy and credibility of a trial. Accordingly, a defendant denied the protection of section 868 might feel compelled to abandon his right of silence at the hearing and to embrace a tactic of trying the case in the media." (*Mercury-News, supra,* 30 Cal.3d at p. 512.) Further, due to the timing of a preliminary hearing, a defendant will frequently find it difficult to show that prejudice is likely

and closure is justified. "The evidence required may not be available at an early stage, when community reaction and the media's attitude are not clear. Moreover, defendant may have little knowledge before the hearing of the prosecution's strategy and evidence. That additionally clouds his ability to prove the value to him of closure." (*Mercury-News*, *supra*, 30 Cal.3d at p. 513, fn. omitted.)

Although, by amendment of section 868, the Legislature intended to clarify the right of public access to preliminary hearings, there is no indication that the Legislature intended to encroach upon the rights of defendants to receive a fair trial. Section 868 expressly requires closure of the hearing if the court finds that right endangered. Therefore, the comments of the court in *Mercury-News* describing the prejudicial effect of certain pretrial publicity are germane to any consideration of the standard to be used in implementing section 868 as amended.

We conclude that the *Brooklier* test is inappropriate as a standard for closure under section 868. The *Brooklier* test was formulated in deference to the public's *First Amendment* right of access to *voir dire* proceedings and actual trials. (See *United States* v. *Brooklier*, *supra*, 685 F.2d at p. 1167.) Even in the constitutional context, Justice Powell in *Gannett* stated that the *Brooklier* test (as contained in his brethren's dissent) would not adequately safeguard defendant's right to a fair trial. "A rule of such apparent inflexibility could prejudice defendants' rights and disserve society's interest in the fair and prompt disposition of criminal trials." (*Gannett Co.* v. *DePasquale*, *supra*, 443 U.S. at p. 399 [conc. opn. of Powell, J.].) The right of access at a preliminary hearing is conferred by statute. This difference in the source of the right being asserted, as well as the greater difficulty in showing prejudice at the preliminary stage, mandate the application of a more flexible standard.

In *Cromer* v. *Superior Court* (1980) 109 Cal.App.3d 728, 733-734, the court held that the appropriate standard for insuring the accused a fair trial under the threat of adverse pretrial publicity is whether there is a "'reasonable likelihood' of substantial prejudice. [Citation.]" The court also noted that a defendant is entitled to "'receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial court must take strong measures to ensure that the balance is never weighed against the accused.*'" (Original italics.) (*Cromer* v. *Superior Court*, *supra*, 109 Cal. App.3d at pp. 731-732, quoting *Sheppard* v. *Maxwell* (1966) 384 U.S. 333, 362 [16 L.Ed.2d 600, 620, 86 S.Ct. 1507].)

Heretofore the crucial component lacking in section 868 cases was the requirement that the lower court apply a balancing test before closing a preliminary hearing. Although in *Mercury-News* the court pointed out that a balancing approach would be difficult to apply with respect to preliminary hearings because of the early stage of development of the case, the court also recognized that in many instances concerns may be amenable to judicial balancing on a case-by-case basis and the Legislature had the power to accommodate these interests. (*Mercury-News*, *supra*, 30 Cal.3d at p. 514) The amendment clearly states that the requirement of an "open and public" preliminary hearing shall yield upon the defendant's request *and* a finding that exclusion is necessary to protect the defendant's right to a fair and impartial trial. Thus, in section 868 the legislature has provided a framework for such a case-by-case analysis. We conclude that a preliminary hearing must be closed at defendant's request if, after balancing the competing interests, the court finds a reasonable likelihood of substantial prejudice which would impinge on the defendant's right to a fair trial.

In making its determination the court should consider: (1) the extent and prejudicial impact of past media coverage; (2) the likelihood and degree of prejudicial impact resulting from media coverage of the impending preliminary hearing; (3) the relative size of the prospective jury pool; (4) the efficacy of closure as a means of protecting the defendant's right to a fair trial; and (5) the existence of viable alternatives. (See generally, *Nebraska Press Assoc.* v. *Stuart* (1976) 427 U.S. 539, 562-563 [49 L.Ed.2d 683, 699-700, 96 S.Ct. 279] (speculating on the existence of prospective prejudice was proper); *Mercury-News, supra,* 30 Cal.3d at p. 512-513.) Additionally, since the court must stay open to balancing the two competing interests, prudence suggests that it remain receptive to reasonable arguments advancing other relevant factors.

What constitutes a viable alternative in lieu of closure may differ with each case. The court should consider any alternative which would still protect the defendant's right to a fair and impartial trial. (See generally, *Gannett Co. v. DePasquale, supra,* 443 U.S. at pp. 441-442 [conc. & dis. opn. of Blackmun, j.]; *Brian W.* v. *Superior Court* (1978) 20 Cal.3d 618, 625.) Restraints on publication are generally not viable because they impose an equal, or often greater, restraint than closure on First Amendment rights. (*Mercury-News, supra,* 30 Cal.3d at p. 513.) Finally, a change of venue or postponing the trial until the effect of pretrial publicity subsides, are usually not viable because they may subject the parties to great inconvenience, while possibly violating a defendant's right to a speedy trial in the vincinage.[7]

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[7]Diaz filed a response to the order to show cause contained in the alternative writ. (Cal. Rules of Court, rule 56(c).) As Diaz correctly notes, his right to a speedy trial in the vicinage has common law and constitutional antecedents. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; *People* v. *Jones* (1973) 9 Cal.3d 546, 556.) "[A] defendant has a right to have his case tried in the place of his residence, and no change of venue can be forced down his throat by publicity in the press. [Citation.]" (*Rosato* v. *Superior Court* (1975) 52 Cal.App.3d 190, 210, cert. den., 427 U.S. 912 [49 L.Ed.2d 1204, 96 S.Ct. 3200].)

Because a denial of a preliminary hearing transcript is also a denial of a right of access protected by section 868, it must be tested by the same standards and satisfy the same requirements as the initial closure. (Cf. *United States v. Brooklier, supra,* 685 F.2d at p. 1172.) Moreover, even when a transcript has been properly sealed, it must be released upon a proper showing that a reasonable likelihood of substantial prejudice to the defendant's right to a fair trial no longer exists.

IV. Propriety of the Lower Courts' Orders

The magistrate granted the motion to close the preliminary hearing relying on *Gannett.* The magistrate found that due to pretrial publicity, and the general nature of preliminary hearings, only the prosecutorial side of defendant's case would be reported in the media. Because there was no objection to the closure at the preliminary hearing, the record does not reveal whether the court considered the competing rights of public access or the existence of viable alternatives prior to closure. However, it is apparent that the court found a reasonable likelihood of substantial prejudice and granted the closure motion to protect Diaz' right to a fair and impartial trial.

We turn now to the order sealing the transcript. Petitioner contends that the superior court failed to state any reasons or make a specific finding to support the sealing order as required by section 868; the court sealed the transcript based on an insufficient showing of possible prejudice; and the court failed to consider any alternatives.

A review of the record of the hearing on petitioner's request for access to the transcript reveals that the court considered Diaz' right to a fair trial and concluded that there was "a reasanable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." The court did not specifically state on record that this right was considered in light of the countervailing access rights of the public. However, it is clear that the court recognized the existence of the right of access but determined that the probability of prejudice to Diaz' right to a fair and impartial trial continued as long as the matter remained set for a jury trial.

Petitioner and amicus curiae contend that the order sealing the transcript should be vacated for the following reasons: (1) the media coverage has been factual and therefore of a nonprejudicial nature (2) since the evidence adduced at the preliminary hearing was neither inflammatory nor sensational it is not likely to lead to extensive media coverage at this time; (3) the testimony is free from potentially inadmissible evidence and confessions; (4) any evidence about the preliminary hearing is likely to be forgotten before trial; (5) media coverage has been declining significantly since the time Diaz was first charged with murder; and (6) the transcript can be selectively released deleting the prejudicial portions.

Diaz maintains, however, that (1) release of the transcript would significantly impair his right to be tried by an impartial jury selected from Riverside County (2) the preliminary hearing testimony is subject to evidentiary attack at trial; (3) some of the municipal court's comments were prejudicial; (4) media coverage has been extensive in general; and (5) a venue study reveals that he could still get a fair trial in Riverside County largely due to the superior court's protective order.

Balancing the competing interests leads to the conclusion that the trial court acted properly in ordering the transcript sealed. For the reasons which follow, we hold that the trial court could properly conclude that releasing the transcript, as long as the case remains set for a jury trial, would create a reasonable likelihood of substantial prejudicie to Diaz' right to a fair trial.

This case has been the subject of intense media coverage for over two years. A substantial amount of this coverage occurred before Diaz was arrested in November of 1981. Most of the articles before his arrest contained a common theme of suspicion and implication. Diaz was frequently questioned by the media concerning his possible involvement. Some of the articles depicted the details of suffering which the victims endured before their death. An article covering Diaz' arrest displays a photograph of him in handcuffs and police custody. After the transcript was sealed, newspaper coverage declined.

Petitioner is in error in suggesting that factual evidence cannot be prejudicial. Petitioner directs this court to *Mercury-News, supra,* 30 Cal.3d at p. 512 and asserts that the court stated that if the evidence is factual and not inflammatory or sensational, then it cannot be said that publication of this information would necessarily produce a jury pool within which the defendant's guilt has already been ascribed.

The opinion actually states: "Yet inflammatory or misleading publicity is not the only unfair publicity. Factual, relevant reporting may be prejudicial too if it produces a jury pool within which a defendant's guilt has already been ascribed." (*Mercury-News, supra,* 30 Cal.3d at p. 512.) While it is true that factual reporting does not invariably lead to prejudice, as *Mercury-News* stated, such reporting can be prejudicial because it may produce a jury pool in which defendant is presumed guilty. This principle is applicable here. Moreover, apart from (but related to) this

principle, the transcript is indicative of only the prosecutorial side of the case, bringing to mind many of the other concerns expressed in *Mercury-News*. Our examination of the transcript convinces us that even factual dissemination of its contents would result in public awareness of potentially inadmissible evidence and prejudicial comments. Were this to occur, the exclusion of such evidence in court during the trial would be rendered meaningless. (See *Sheppard v. Maxwell, supra*, 384 U.S. at p. 360; *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877-878.) Additionally, petitioner's contention that such evidence would be forgotten is not persuasive with Diaz' trial just weeks away at the time of this hearing.

The transcript consists of 47 volumes, 4,239 pages, spanning 8 weeks of testimony. The sheer volume of the transcript suggests that its release would generate substantial media coverage. Although petitioner argues that the more severe danger of "day-to-day" reporting has now passed with the conclusion of the preliminary hearing, there is nothing to prevent the press from bringing about its recurrence. Further, any coverage would have the effect of renewing questions about Diaz' involvement, thereby reopening the pre-arrest publicity.

Alternatives to sealing the transcript would not suffice in this case. Citing *Associated Press* v. *U. S. Dist. for C.D. of Cal.* (9th Cir. 1983) 705 F.2d 1143, petitioner suggests the use of clear and emphatic jury instructions and an intensive *voir dire* as alternatives to sealing the transcript. However, in that case these measures were found practicable in a large urban area. Relying on *Nebraska Press, supra*, 427 U.S. 539, *Associated Press* stated in a large urban area such as Los Angeles, there are millions of potential jurors, and these alternatives will screen out those with fixed opinions regarding the defendant's guilt or innocence. (*Associated Press* v. *U.S. Dist. Ct. For C.D. of Cal., supra*, 705 F.2d at p. 1146.) Since the population in Riverside County is substantially smaller, these alternatives

would be less effective. The release of the transcript and employment of these alternatives would tend to exacerbate the existing prejudice. (See *Cromer* v. *Superior Court, supra,* 109 Cal.App.3d at p. 735.)

A change of venue would not only impinge on Diaz' constitutional right to be tried by a Riverside County jury, but would also subject many people to great inconvenience. Postponement would delay what has been projected to be the longest criminal trial in Riverside County history while possibly violating Diaz' right to a speedy trial. Finally, we reject petitioner's contention that selective release of the transcript is indicated. Even if the administrative burden of such a task could be overcome, the selective release would be impossible in view of the overall tone of the transcript.

The public's right of access to preliminary hearings and transcripts under section 868 is an important interest which should only be denied when there is a reasonable likelihood of substantial prejudice to a defendant's fair-trial rights. There was such reasonable likelihood as long as this case awaited a jury trial.

DISPOSITION

The alternative writ of mandate is discharged; the peremptory writ is denied.

CERTIFIED FOR PUBLICATION

MORRIS
P.J.

We concur:
KAUFMAN
J.

MC DANIEL
J.